

September 30, 2019

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Via U.S. Mail & Electronic Mail (Jaikaran.Bianca@epa.gov)

Bianca N. Jaikaran
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, SW
Atlanta, Georgia 30303

***RE: Good Faith Offer Letter
Horton Iron & Metal Site in Wilmington, NC***

Dear Ms. Jaikaran:

I am in receipt of your letter dated September 16, 2019.

Before addressing a number of the points raised in your letter, I want to again extend our thanks to you and others at the United States Environmental Protection Agency Region 4 (“EPA”) for meeting with representatives for W.R. Grace & Co.-Conn. (“Grace”) on August 22, 2019, to discuss the site referenced above, located at 2216 U.S. Highway 421 North, Wilmington, North Carolina (the “Site” or “Property”). Grace was grateful to have had the opportunity to meet with EPA and Department of Justice (“DOJ”) to discuss the facts of the case and legal theories of liability. Grace continues to desire resolution of this matter and for that reason is submitting this Good Faith Offer (“GFO”), even though Grace maintains that it is not a party that should bear any responsibility for the Site.

With regard to your letter itself, Grace takes exception to a number of the declarations and interpretations of the “evidence” cited by EPA in support of the same. However, Grace also questions the benefit of continuing to dispute the same when many of these inconsistencies have no bearing on liability. Perhaps the place to start is at the end of your letter, where you concluded “[i]n consideration of the foregoing evidence, EPA continues to identify W.R. Grace as a potentially responsible party (“PRP”) at the Horton Site which caused releases of hazardous substances by the

demolition of the fertilizer facility and which likely caused additional releases through its course of fertilizer manufacturing operations from approximately 1949 to 1959.” Despite a robust discussion at our in-person meeting and a lengthy response letter, EPA has yet to present any evidence that hazardous substances were “disposed of” (or released) during the term of its ownership or operation of the fertilizer facility at the Site. In the absence of such evidence, Grace has no liability under CERCLA Section 107(a)(2). EPA’s attempt, outlined in your recent letter, to shift to an “arranger” theory of liability under CERCLA Section 107(a)(3) is similarly baseless.

Continued Absence of CERCLA Liability

1. No Basis for Liability as Historic Owner

As was noted in my pre-meeting letter dated August 20, 2019, on a fundamental level, CERCLA does not impose liability for mere past ownership of property; it requires more. In order to hold Grace liable as a past owner or operator, EPA must provide evidence establishing that Grace was a “person who *at the time of disposal of any hazardous substance* owned or operated any facility at which such hazardous substances were disposed of.”¹ References to directory listings and meeting minutes relating to financial performance are not evidence of “disposal” of a hazardous substance during Grace’s ownership of the Site. Mere historical ownership of an industrial property is not sufficient to establish CERCLA liability. Had Congress intended such a result, it could potentially have done so; but its statute requires evidence that disposal of a hazardous substance occurred during such ownership.

Prior to our in-person meeting, EPA consistently took the position that Grace was a potentially responsible party liable under CERCLA because it removed at the Site during its ownership. This theory is inconsistent with the evidence. As was discussed during our in-person meeting, the evidence indicates that the buildings present during Grace’s ownership were removed *after* Grace sold the Property. (Regardless of the timing of building removal, EPA has not shown that there was a disposal of a hazardous substance associated therewith.) EPA appears to acknowledge this lack of evidence in your September 16 letter, by its shift in position to assert a new theory of “arranger” liability. Neither the facts nor the law support a finding of CERCLA liability under a theory of “arranger” liability in the case.²

¹ 42 U.S.C. §9607(a)(2) (emphasis added).

² Despite acknowledging that it may be “unclear” whether Horton demolished the buildings on the Property before or after acquiring title to the land, EPA unequivocally asserts, despite evidence to the contrary, that “the foundation (concrete slab) of the fertilizer facility was dug up and removed as part of the demolition.” The asserted basis for this position is a post-sale “aerial photograph from 1960, as well as Grace’s aerials photographs from subsequent years (*e.g.* 1969, 1970, 2016).” In detailed contrast, however, the February 2014 Remedial Investigation Report by Conestoga-Rovers Associates shows, at Figure 2 and Appendix B that concrete slab was observed at the surface at approximately the center of the former building location and boring locations (SB-10, SB-13, SB-14, SB-15 and PZ-1) indicated the presence of 0.33 feet to 1.5 feet (average of 0.72 feet) thick concrete from

2. No Basis for Arranger-Liability

While not cited by EPA, the touchstone arranger-liability case - *Burlington Northern and Santa Fe Railway Co. v. United States* – was decided by the United States Supreme Court in 2009.³ In *Burlington*, the Supreme Court found that “CERCLA imposes strict liability for environmental contamination upon an entity that ‘arrange[s] for disposal ... of hazardous substances,’” citing 42 U.S.C. §9607(a)(3), and that “ [a]n entity may qualify as an “arranger” of the disposal of hazardous substances, for purpose of liability provision of CERCLA, when it takes *intentional steps to dispose of a hazardous substance*.”⁴ The Supreme Court held that “the determination whether an entity is an arranger requires a *fact-intensive inquiry* that looks beyond the parties’ characterization of the transaction as a ‘disposal’ or a ‘sale’ and seeks to discern whether the arrangement was one Congress intended to fall within the scope of CERCLA’s strict-liability provisions.”⁵

The facts specific to this case, as well as the knowledge in the industry at the time of the transaction, do not show that Grace had the requisite intent to dispose of a hazardous substance when it sold the Property to Horton Iron & Metal, Inc. (“Horton”) in 1959. Instead, the facts show that, on February 10, 1959, Grace did exactly what it was directed to do by the Board of Directors for Grace on August 7, 1958: sell assets.⁶

The letter agreement between Grace and Horton dated February 10, 1959 (the “Asset Sale Agreement”), accomplished the directive of Grace’s Board of Directors – sell certain assets of a dissolving corporation in a manner that benefits the Corporation. In the Asset Sale Agreement, Grace sold to Horton the right to remove “[a]ll buildings on the premises, with the exception of the ‘Welfare House’,” “cleared of any debris resulting from the removal” for payment from Horton to Grace of three thousand, two hundred dollars (\$3,200.00). As part of the exchange, Horton was also entitled to salvage value of the material it was authorized to remove from the Property. In addition to selling the building assets, Grace also made it clear that it was not selling certain assets,

the western to eastern end of the former building, overlain by 0.17 feet to 1.5 feet (average of 0.78 feet) of soil. Note that other soil sampling locations in the area of the former building were of only the top 6 inches of soil and thus may not have been deep enough to encounter the buried slab.

³ 556 U.S. 599 (2009).

⁴ *Id.* at 611.

⁵ *Id.* at 610.

⁶ Grace’s board of directors provided a broad authorization for disposition of assets, by directing it’s management to “sell and dispose of the property, equipment and fixtures of the Wilmington Plant of this Corporation in such manner and for such consideration as [it] deems fit and appropriate and in the best interest of the Corporation, such authorization to include the right to dismantle the buildings.” See Grace Resolution relating to sale of Naco assets (September 23, 1958) produced under Exhibit A to Grace’s December 19, 2011 104(e) response.

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specifically named as “four pay-loaders, a motor generator, and cross ties.” Those assets were to remain the property of Grace.⁷

The Asset Sale Agreement became unnecessary when it was later decided to sell the physical real property to Horton. As such on April 30, 1959, the parties modified the Asset Sale Agreement to void any obligation for anyone to remove buildings.⁸ The actual and final agreement was a simple sale, and Grace had no control over how the buildings were used (or not) once the real estate was sold to Horton. The modified Agreement demonstrates Grace’s intent to sell the assets, not dispose of hazardous substances. And, the subsequent sale of the real estate (excluding any equipment that was already sold under the terms of the Asset Purchase Agreement) for payment of an additional \$20,000,⁹ without any limitation or directives as to its future use is further evidence that Grace accomplishes its sole objective – to sell the assets associated with its dissolved subsidiary.

Acknowledging that the demolition-equals-disposal theory fails because of the timing of demolition, EPA now attempts to characterize the sale of these assets as evidence of an “intent to dispose” based on the sale price. EPA compares the 1948 acquisition cost for Naco from American Agricultural Chemical Company and the 1959 sales price by Grace to Horton, suggesting that the sales must necessarily be for more than the acquisition price and that the assets transferred were the same. This assumption is unfounded and there is no reason these values should be equivalent. The two separate transactions involved different assets, different entities, and widely different business purposes: replacing production capacity after a devastating fire versus selling assets of one facility at time of dissolution of a larger company. The December 23, 1948, transaction involved the purchase of real estate, improvements and business assets¹⁰ that would allow Naco Fertilizer Company (“Naco”) to use a pre-existing facility and real estate from American Agricultural Chemical Company. This 1948 transaction provided Naco with the necessary real estate and business assets both to continue supplying customers after its existing operation in Wilmington was destroyed and to avoid investing significant capital expenditures (and

⁷ See February 10, 1959 Letter from Davison Chemical Company to Mr. Gillum K. Horton, President, Horton Iron & Metal Co., Inc., regarding agreement to remove certain buildings produced under Exhibit A to Grace’s December 19, 2011 104 (e) response.

⁸ See Letter & Agreement dated April 30, 1959, produced under Exhibit A to Grace’s December 19, 2011 104(e) response.

⁹ US Department of Agriculture, National Agriculture Statistics Service data (available at <https://www.nass.usda.gov/>) shows that the average price of agricultural land (“AG Land, Incl Building – Asset Value, Measured in \$ / Acre”) in 1959. This service indicates that the average price was \$177 per acre. This would equate to \$7,452 for 42.1 acres (the acreage of the Site). Given the limited information available concerning historic sales in 1959, Grace finds this information instructive and worthy of consideration when evaluating the value of the Site at the time of sale from Grace to Horton in 1959.

¹⁰ See article dated November 18, 1948 (“J.M. Blass, manager of Naco, said yesterday afternoon that he expected negotiations to be consummated in the near future and that the transaction would involve approximately \$100,000, including a quantity of fertilizer materials.”) attached hereto as Exhibit A.

presumably significant downtime) to rebuild its destroyed facility. In contrast, the April 30, 1959, sale of property between Grace and Horton transferred real estate, a building, and some machinery, but no business assets and not certain listed equipment. Horton had the express right to “house a watchman on the premises during the removal period”¹¹ and to be paid for the value of the building structure – each an indication of the positive value of the assets transferred. Handwritten notes in Grace’s file dated June 26, 1959,¹² establish the land had a tax assessed value of \$10,525 – slightly more than half the price of \$20,000, at which Grace sold the property to Horton.¹³ Arranging for the sale of property is not the same as arranging for disposal of hazardous substances and cannot alone be the basis for CERCLA liability.

EPA’s reliance on the *United States v. Dico, Inc.*¹⁴ and *CP Holdings v. Goldberg-Ziono & Assocs.*¹⁵ is misplaced. The analysis under both cases support a finding of no arranger liability under the present Horton matter. As noted above, the Supreme Court in *Burlington* made it clear: to qualify as an “arranger of the disposal of hazardous substances,” it takes “*intentional steps to dispose of a hazardous substance.*”¹⁶ The *Dico* court undertook a site-specific analysis to determine whether the defendants had the requisite intent to qualify as arrangers. In *Dico*, defendant Dico owned multiple buildings contaminated with polychlorinated biphenyls (“PCBs”) that were the subject of a 1994 administrative order that required the defendant to address the PCB contamination.¹⁷ Without informing EPA, in 2007, the defendant (through its co-defendant corporate affiliate) sold the building. Applying the reasoning in *Burlington*, the *Dico* court found that defendants were subject to arranger liability based on the evidence that Defendants intended to dispose of the PCB contamination through the sale. The court relied on a number of the district court’s findings in support of this determination, including defendants’ failure to inform the buyer that the building was contaminated and subject to an EPA order, as well as defendants’ knowledge that it would avoid remediation costs that would greatly exceed the purchase price.¹⁸

The facts in *Dico*, however, are nothing like those in this matter. EPA did not even exist when the relevant transactions occurred; CERCLA’s concepts of hazardous substances did not exist. EPA’s theory that Grace had an intent to avoid costs of disposal of hazardous substances is not supportable. To have intent to avoid a liability, one must have a realistic likelihood of incurring

¹¹ See February 10, 1959, Agreement, p.1, paragraph 4 produced under Exhibit A to Grace’s December 19, 2011 104(e) response.

¹² See Handwritten Note regarding tax assessed value of Property (June 26, 1959) produced under Exhibit A to Grace’s December 19, 2011 104(e) response.

¹³ See Contract for Sale of Land between Grace and Horton (dated June 16, 1959) produced under Exhibit A to Grace’s December 19, 2011 104(e) response.

¹⁴ 920 F.3d 1174 (8th Cir. 2019).

¹⁵ 769 F. Supp. 432 (D. N.H. 1991).

¹⁶ 556 U.S. at 611.

¹⁷ 920 F.3d at 1177.

¹⁸ *Dico*, 920 F.3d at 1179.

it. It is illogical to suggest that in 1959 Grace could have had an intent to dispose of hazardous substances to avoid CERCLA liability.

Furthermore, to establish a *de facto* merger, EPA has not asserted that Grace knew of any “hazardous substances” as such. *See Appleton Papers Inc. v. George A. Whiting Paper Co.*, 2012 WL 270490 (E.D. Wis. July 3, 2012), *aff’d*, *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682 (7th Cir. 2014) (“It seems doubtful that a defendant can *ever* be found to be an arranger if he did not know the substance in question is hazardous”). The level of knowledge in 1959 regarding environmental hazards particularly in building components was very different from today’s. EPA makes reference to the typical building material components, lead and asbestos, with their now-known hazards, as evidence that Grace had an intent to dispose of ‘hazardous substances’ at the time of the 1959 transfer.¹⁹ At the time of the sale to Horton, Grace’s transaction was consistent with a plain reading of the documents and merely a sale of assets. This transaction does not evidence any intent to arrange for disposal of a hazardous substance.

The second case cited by EPA, *CP Holdings v. Goldberg-Ziono & Assocs*, similarly supports a finding of no arranger liability in the case. *CP Holding* is a 1991 cost recovery case involving whether sale of a building known to contain asbestos qualifies as “disposal”. Again, different time, different level of knowledge, different outcome.

For these reasons, any attempt by EPA to assert “arranger” liability must fail.

3. No Evidence that Grace (or Naco) Disposed of Hazardous Waste During its Ownership or Operation

EPA’s assertion that Grace “likely caused additional releases through its course of fertilizer manufacturing operations from approximately 1949 to 1959” must also fail for lack of evidence. Even if Grace were to have engaged in fertilizer manufacturing operations, which is denied, operation alone is not evidence that Grace “released” or, more appropriately for statutory liability purposes, “disposed of” any hazardous substance during its ownership or operation of the Site.

EPA’s assertion of “manufacturing” operations as evidence of a “release” is not sufficient. EPA makes reference to city directories that contain a header of “Fertilizer Manufacturer” (Exhibits B and J) and an article in Employment Security Comm’n of N.C., Quarterly from Spring 1949 (Exhibit C) as evidence that Naco (not Grace) engaged in

¹⁹ EPA Letter dated September 16, 2019 (“W.R. Grace previously produced to the EPA a written contract it entered into in February 1959 for Horton Iron & Metal Company to demolish and dispose of the buildings at the Site and their contents, including lead and asbestos, both hazardous substances.”) For clarification, nothing in the February 1959 agreement mentions either lead or asbestos, nor does it call for Horton to “demolish and dispose of” buildings but rather provides that all buildings, except one, “shall be removed by you and the land cleared of any debris resulting from such removal.”

manufacturing operations. City directories, however, do not support EPA's necessary showing;²⁰ even if they were admissible, which is questioned, they do not show that a release of hazardous substances occurred. These directories are not evidence of "disposal of a hazardous substance" by Grace, or by Naco.

As discussed with EPA during our meeting on August 22, 2019 and supplemented with information in our September 6, 2019 letter, a comparison of historical Sanborn fire insurance maps shows a clear distinction between the operations at the Site by American Agricultural Company and subsequent operations by Naco or Grace. Acid manufacturing operations at the Site, which were conducted in the large "Acid Chamber Building" shown on the 1915 Sanborn map to the northeast of the main site building, were discontinued and the building was removed prior to Naco's ownership of the Site.²¹ These historical acid chamber operations are known to be significant sources of lead, arsenic, and other contaminants to soil and groundwater and this source was specifically cited by EPA and consultants in site investigation and remedy decision documents as the primary source of contamination from the historical fertilizer manufacturing operations at the Site.²² There is no evidence that acid manufacturing operations occurred during Naco or Grace ownership at the Site.

Moreover, for sake of discussion, to the extent fertilizer related operations occurred at the Site during Naco or Grace ownership, there is no evidence to support EPA's mere assumption that such activities would have included hazardous substance disposal. As noted above, the evidence instead indicates that Naco and Grace's activities at the Site were very different in nature and magnitude from the historical fertilizer manufacturing with acid chamber operations. Any fertilizer activities engaged in by Naco or Grace were more likely than not limited to blending or packaging of useful fertilizer products.²³ And, there is no evidence to establish that any such handling of useful products resulted in disposal, or resulted in the contaminants targeted in the ROD.

²⁰ EPA cited Exhibits B, C and J to its September 16 letter as evidence that Naco conducted "fertilizer manufacturing operations and [imported] fertilizer materials and insecticides in Wilmington." Exhibits J and B contain nothing more than, 1940 and 1952, respectively, address listings for Naco's business office with reference to plant locations. EPA represents Exhibit C as an article that "reports that Naco was manufacturing fertilizer in North Carolina at its Wilmington plant," when it is more accurately a 1949 article that Naco (not Grace) was a "firm[] engaged in manufacturing fertilizer which [has] home office[] in the State."

²¹ See Sanborn maps from 1915 and 1951, 1938 aerial photograph, and site map dated February 15, 1949, referenced in Grace's August 20, 2019 letter to EPA.

²² See ROD, §2.2, 5.3.1, and 5.3.2. and corresponding sections from February 2014 Remedial Investigation Report, and April 2018 Feasibility Study Report Revision 3.

²³ As evidenced by the labeled operations identified on the 1951, 1953, and 1955 Sanborn maps that have been provided to EPA. These list operational areas at the Site that include "Mixing", "Bag Machine", Bagging & Storage" in the main plant building. We also note that there appears to be only a single "Bag Machine" area on the 1955 Sanborn map, suggesting that operations at the Site had been reduced even further since the early 1950s.

In the absence of evidence of “disposal of a hazardous substance,” EPA cannot establish CERCLA liability against Grace, or its dissolved subsidiary, Naco.

Naco and Grace Never Legally Merged

Despite EPA’s repeated assertions otherwise, Grace is not responsible for the liabilities, if any, of Naco. Grace has no liability under CERCLA deriving from Naco’s ownership of the Site. As stated in my earlier letter dated August 20, 2019, Naco, a corporation organized under the laws of West Virginia, was a subsidiary of W. R. Grace & Co.–Conn., was properly dissolved, and distributed its assets in accordance with West Virginia law in 1954. At the time of its dissolution, after publication of notice and resolution of liabilities, the assets of Naco, including the Property and its buildings, were transferred to Grace, in resolution of Naco’s debts to Grace, and all stock was cancelled.

Under West Virginia law and under federal common law, Naco is a dissolved corporation that has distributed its assets and is considered “dead and buried” and, therefore, not liable under CERCLA. *See Holland v. Kitchenkan Fuel Corp.* (“The very reason to provide by statute for dissolution of a corporation is to provide for an orderly end to its affairs and to lend certainty and finality to its business, property and obligations. This purpose would be utterly defeated if a dissolved corporation remained amenable to suit indefinitely and corporate assets could be pursued without limit into the hands of the corporation's distributees. Accordingly, it is imperative that at some point the capacity of a dissolved corporation to be sued must end.”)²⁴ *citing Chatham Steel Corp. v. Brown*, 858 F.Supp. 1130, 1152 (N.D.Fla.1994) (“If a corporation has formally dissolved but not yet completed distributing its assets, then the corporation is merely dead. Under these circumstances, a corporate res remains to pay for cleanup costs and further the goals of CERCLA. Hence dissolved corporations which have not distributed their assets may be sued under CERCLA. On the other hand, if a corporation has dissolved and finished distributing its assets, then it is dead and buried. In this situation, there is no entity to sue or defend a suit, and there are no assets to satisfy any CERCLA judgment. Dead and buried corporations are therefore not amenable to suit under CERCLA.”). Furthermore, as the West Virginia court in *Holland* continued, “[i]t would completely violate the objective of finality of corporate dissolutions for this court to hold a dissolved corporation liable for an obligation completely arising after the corporation were dissolved.”²⁵

Consistent with this law, EPA has not sought relief from Naco here, nor could it practically. Rather, EPA attempts to undermine basic corporate law principles of dissolution described above. It asserts an exception derived from corporate transactional practice and attempts to apply one of the few exceptions to “the traditional rule, [that] when one company sells or transfers all its assets

²⁴ 137 F.Supp.2d 681, 686 (S.D.W. Va. 2001).

²⁵ *Id.*

to another company, the latter is not liable for all the debts and liabilities of the transferor.” *Acme Boot Co. v. Tony Lama Interstate Retail Stores, Inc.*²⁶ The doctrine of *de facto* merger would not be appropriately applied here, but we address it *arguendo*.

EPA seeks to impose on Grace the alleged CERCLA liability of Naco by characterizing the corporate dissolution of Naco as a *de facto* merger of Naco into Grace. Without further discussing this approach, we point out that even were the *de facto* merger doctrine appropriately applied here, EPA would have to come forward with sufficient evidence to satisfy the requisite elements. The elements of a *de facto* merger, to the extent they are accepted by the Fourth Circuit, are as follows:

- (1) There is continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations.
- (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation.
- (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.
- (4) The purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

*Acme Boot Co. v. Tony Lama Interstate Retail Stores, Inc.*²⁷

The evidence does not support EPA’s allegation of a *de facto* merger. For instance, with regard to the first element, continuity of enterprise, the “evidence” cited by EPA is neither conclusive, nor supportive of the position advocated by the EPA. The meeting minutes cited by EPA are not evidence of “continuity of management.” Rather, they are evidence of an intent to change the existing management structure. As such, these meeting minutes actually support, rather than undermine, a finding that the parties did not intend for Grace to continue the management of

²⁶ 929 F.2d 691 (4th Cir. 1991), citing *Crawford Harbor Ass’n v. Blake Construction Co.*, 661 F. Supp. 880, 883 (E.D. Va. 1987); *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451 (11th Cir. 1985); *Kemos, Inc. v. Bader*, 545 F.2d 913, 915 (5th Cir. 1977).

²⁷ 929 F.2d 691 (4th Cir. 1991).

Naco. The intent to change, rather than continue, the existing management is also evidenced by the December 1954 *Davison Beaker* article, which describes the new management structure established to accommodate the new mix of fertilizer plants.²⁸ By way of further example, with regard to the fourth element, assumption of liabilities and obligations, EPA cites this same article from the *Davison Beaker*. But, it does not evidence an assumption by Grace of Naco's liabilities and obligations. In contrast, the Certificate of Dissolution shows how liabilities and obligations of Naco were addressed: by following the formalities of West Virginia corporate law, including published notice, payment of all debts, liabilities and obligations, and excepting cash and assets reserved for payment of liabilities.²⁹ No contracts, leases, or other documents have been produced which evidence the assumption of any obligations of Naco by Grace.

In *Atwell v. DJO, Incorporated*,³⁰ the Eastern District North Carolina court held that “[a]s a general rule, an asset purchase does not create successor liability in the purchasing corporation under North Carolina law.” While the *Atwell* court recognized that the general rule does not apply in certain instances,³¹ the court went on to say that “[n]o North Carolina decision has applied the de facto merger doctrine”³² The plaintiff in *Atwell* made many of the same contentions asserted by EPA in this case. First, the plaintiff attempted to establish a *de facto* merger by citing a contract (indemnification agreement) as support for finding a *de facto* merger. The *Atwell* court found that the contract actually supported, rather than undermined, a finding that the parties did not intend for the buyer to assume the liabilities of the seller. The plaintiff then contended that transfer of product lines amounted to a *de facto* merger of the two corporations. Again, the *Atwell* court disagreed and specifically “decline[d] to expand North Carolina common law” based on this argument. Finally, the plaintiff contended that “the transactions were fraudulently structured to avoid the liability of potential claimants” Once again, the *Atwell* found that no exception to the general rule applied because the plaintiff “ha[d] presented no evidence suggesting any party to the transactions had knowledge of future litigation involving the [] product lines.” The *Atwell* court further found “no litigation was pending” at any point during the relevant period, and, “the parties did not structure the transactions to avoid any known, specific liability.”³³ Much like the

²⁸ See Grace's September 6, 2019 letter to EPA, Exhibit 10.

²⁹ Application for Certificate of Dissolution, September 23, 1954, as produced in an email from Grace dated May 23, 2012 (“The board of directors shall proceed to pay off and discharge or provide for payment of all debts, liabilities and obligations of this corporation; and, after fully paying and discharging or providing for payment of the same shall distribute the remaining properties, choses in action and assets of this corporation to its stockholder, in complete cancellation of all its stock....”)

³⁰ 803 F.Supp.2d 369, 371 (E.D.N.C. 2011) (citing, e.g., *Becker v. Graber Builders, Inc.*, 561 S.E.2d 905, 909 (2002).

³¹ *Id.*, at 371 (“[T]his general rule does not apply if: apply if: (1) there is an express or implied agreement by the purchasing corporation to assume the debt or liability, (2) the transfer amounts to a de facto merger of the two corporations, (3) the transfer of assets was done for the purpose of defrauding the corporation's creditors, or, (4) the purchasing corporation is a “mere continuation” of the selling corporation in that the purchasing corporation has some of the same shareholders, directors, and officers).

³² *Id.*, at 372, citing Russell M. Robinson, II, Robinson on North Carolina Corporation Law § 25.04 (7th ed.2009).

³³ *Id.*, at 372-373.

plaintiff in *Atwell*, the facts in the case provide no basis for making an exception to the general rule of North Carolina. As in *Atwell*, the evidence in this case does not support, and in some cases undermines, a finding of *de facto* merger.

The Fourth Circuit has also required significantly more than what EPA has provided to find a *de facto* merger. In *United States v. Davis Mem'l Hosp.*,³⁴ the court upheld the district court's finding that no *de facto* merger existed. In evaluating the first factor, continuity of enterprise, the district court had considered whether two entities were governed by separate boards, whether the personnel of the two entities were ever fully consolidated, and whether the entities maintained separate accounting records; moreover, as to the fourth factor, it considered whether the purchasing entity directly paid any obligation of the selling entity or legally bound themselves to do so. Similarly, in *Acme Boot Co. v. Tony Lama Interstate Retail Stores, Inc.*,³⁵ the court found that several facts which were essential in determining whether there was a *de facto* merger remained in dispute. Two of those facts identified by the court were (1) whether an employment agreement could be construed to be some form of ownership, and (2) whether there was continuity of enterprise based on timing of in-store changes, such as when the credit card machines were changed to reflect the new owner's name as opposed to continuing to operate under the name of the prior owner.³⁶

Furthermore, the Third Circuit in *United States v. Gen. Battery Corp.*,³⁷ as cited by EPA, has required more than what EPA has provided. For example, with respect to factor four, the *General Battery* court considered an unambiguous contract and found "the Price/General agreement expressly provided that General Battery would assume Price Battery's contractual obligations and all other obligations appearing on Price Battery's balance sheet."³⁸ As described above, EPA has cited no evidence establishing an assumption of any liabilities occurred in this case.

In sum, the evidence cited by EPA would be insufficient to support a finding of *de facto* merger. The available evidence remains: Naco was properly dissolved. Grace is not a responsible for the "dead and buried" liabilities, if any, of Naco.

³⁴ 956 F.2d 1163 (4th Cir. 1992).

³⁵ 929 F.2d 691 (4th Cir. 1991).

³⁶ *Id.*, at *3.

³⁷ 423 F.3d 294 (3d Cir. 2005).

³⁸ *Id.*, at 308.

CERCLA Liability (if any) is De Minimis and Capable of Apportionment

It bears repeating that for the many reasons detailed on page 7 of my August 20, 2019 letter, any possible fair and equitable share that could be attributable to Grace, for sake of argument, would be *de minimis*.

In addition, for reasoning similar to that set forth by the United States Supreme Court in *Burlington*, if this matter is not resolved, this case would be appropriate for apportionment of environmental cleanup expenses. As set forth above, *Burlington* is the touchstone arranger-liability case. This same case provides additional insight into the question of when it is appropriate to apportion liability severally.

In *Burlington*, an agricultural chemical distributor began operating on a single parcel of land. The distributor later expanded its business onto an adjacent parcel owned by a railroad company. As part of its business, the distributor purchased and stored various hazardous chemicals. Investigations by the state and EPA revealed significant soil and ground water contamination. In 1989, the state and EPA exercised CERCLA authority over the clean-up of the Site, and later brought suit to recover costs from, among others, the defendant railroads on the grounds that the railroads owned part of the facility.³⁹ The district court apportioned liability, holding the railroads severally liable for nine percent of the governments' total response costs. The Supreme Court agreed with the district court.

After recognizing that "apportionment is proper when 'there is a reasonable basis for determining the contribution of each cause to a single harm,'"⁴⁰ the Supreme Court found that apportionment of nine percent of the liability for environmental cleanup costs to the railroad was reasonable, under CERCLA. Notably, in doing so, the Supreme Court further acknowledged that "it was reasonable for the [district] court to use the size of the leased parcel and the duration of the lease" as the starting point for its analysis. The Supreme Court then went on to find that:

The District Court's detailed findings show that the primary pollution at the site was on a portion of the facility most distant from the Railroad parcel and that the hazardous-chemical spills on the Railroad parcel contributed to no more than 10% of the total site contamination, some of which did not require remediation. Moreover, although the evidence adduced by the parties did not allow the District Court to calculate precisely the amount of hazardous chemicals contributed by the Railroad parcel to the total site contamination or the exact percentage of harm caused by each chemical, the evidence showed that fewer spills occurred on the

³⁹ EPA also attempted to establish "arranger" liability against a supplier. The Supreme Court found that EPA failed to establish CERCLA liability against the supplier.

⁴⁰ *Burlington*, 553 U.S. at 614 (citing Restatement (Second) of Torts §875; Prosser at 315-316.

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Railroad parcel and that not all of them crossed to the [original parcel], where most of the contamination originated, thus supporting the conclusion that the parcel contributed only two chemicals in quantities requiring remediation.⁴¹

As noted in my earlier letter dated August 20, 2019, based on our preliminary review of the ROD, the drivers of remedial costs at the Site occurred *before* and *after* Grace's brief ownership of the Property, as well as on land that simply did not exist until *after* 1959.⁴² These facts, along with Grace's brief ownership compared to 100 years of fertilizer manufacturing and ship breaking and other salvage operations and their associated activities, make this case suitable for apportionment.

Apportionment is just one of multiple approaches that would make Grace's liability, if any, to be several (and not joint). If EPA's claims in this matter were preserved under the United States' Proofs of Claim for Certain Environmental Matters ("2008 Settlement Agreement") as an "Additional Site," EPA has an obligation to resolve this matter "on a basis that is fair and equitable under the circumstances..." 2008 Settlement Agreement, Paragraph 15B. Under EPA settlements with Grace in bankruptcy, this concept was applied to impose on Grace only the liability for its activities and not that for other PRPs or orphan shares. Similarly, here EPA should be looking solely to Grace's fair share based solely on Grace's actions to reach a settlement consistent with the bankruptcy process. Moreover, for the Horton Site, no PRP has preserved in bankruptcy any claim against Grace. Thus, no private rights of contribution are at issue. EPA should not seek recovery from Grace for other PRP's shares. Therefore, if any liability were established, it would be several, based *inter alia* on apportionment, EPA's bankruptcy obligations, and the absence of any PRP right to contribution.

Reservation of Rights

Without qualification, it is Grace's desire to reach closure with regard to any and all claims the United States may assert concerning this Site. Nonetheless, for sake of clarity, please understand that, notwithstanding the above and regardless of any statements made in the course of negotiations, Grace does not waive and hereby reserves all of its rights and defenses should this matter not be resolved. Among these, specifically, Grace reserves its defenses that arise under bankruptcy.

Grace understands that United States will likely take the position that the 2008 Settlement Agreement Resolving the United States' Proofs of Claim for Certain Environmental Matters ("2008 Settlement Agreement") preserved the United States' claim at the Horton Site; however,

⁴¹ *Id.*, at 617.

⁴² See pp. 7-8 of letter from Noelle E. Wooten to Bianca N. Jaikaran dated August 20, 2019, for additional factual discussion.

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in 2012 Grace made the United States aware of an alternative interpretation of the 2008 Settlement Agreement based on the plain language of the agreement.⁴³ These arguments are also preserved.

Good Faith Settlement Offer

For the many reasons discussed above and during our previous discussions and communications, Grace remains confident that it has no CERCLA liability at this Site. Nonetheless, Grace continues to desire to resolve and settle with the United States any and all potential liability associated with the Site.

In developing this Good Faith Offer, Grace has given serious consideration to the available evidence and arguments presented by EPA. Specific consideration has been given to the limited duration of ownership and extent of operations undertaken by Grace at the Site, the nature and extent of contamination identified at the Site, and the scope and cost of proposed remedial actions relative to typical Superfund site cost apportionment and allocation.

Key factors that played a role in Grace's considerations include:

1. The absence of evidence establishing that Grace disposed of any hazardous substances during its ownership of the Site;
2. Grace's limited period of ownership of the Site (five years out of 108 years);
3. Evidence establishing that Grace sold buildings and business assets to Horton for monetary compensation and salvage rights, and, shortly thereafter the land upon which the Site is located, at a price at or above assessed value;
4. The absence of evidence establishing that Naco disposed of any hazardous substances during its ownership of the Site;
5. Evidence establishing that any liabilities of Naco were "dead and buried" and its assets distributed upon its proper dissolution;
6. The absence of evidence to establish a *de facto* merger between Naco and Grace;
7. Evidence indicating that it is more likely than not that the fertilizer manufacturing building was removed by Horton without any Grace involvement and after Grace sold the Site;
8. Evidence establishing that activities unrelated to Grace - shipbreaking and scrapping operations in conjunction with the historical acid chamber building operations at the Site – drive the contamination targeted by the ROD;
9. Evidence from the ROD that the boat slips alone account for a significant portion of the ROD cost (estimated costs of \$4.6 million);

⁴³ See 2008 Settlement Agreement, Paragraphs 15A, B and C and Paragraph 19.

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10. Information that certain primary contaminants targeted by the ROD remedy (notably, PAHs and PCBs) are more likely than not associated with subsequent shipbreaking and scrapping operations and not fertilizer manufacturing operations at the Site; and,
11. The fact that the costs associated with this Site are suitable for apportionment, and any portion attributable to Grace (which is denied) would be *de minimis*, at best.

Taking these considerations into account and in the interest of reaching a global settlement of any and all claims of the United States pertaining to this Site and avoiding the cost of future negotiations and potential litigation, Grace is prepared to offer a one-time global settlement payment of \$350,000, in exchange for the appropriate releases and protections available under CERCLA. This exceeds a fair and equitable share for Grace, given the facts in this case.

Respectfully, Grace believes that if this matter is not be resolved through good faith negotiations, EPA would not be able to establish liability against Grace. Moreover, if, for sake of discussion, liability could be established, liability would be limited to liability to the United States alone (and not to PRPs) and would be further limited to a *de minimis* “several” share.

In closing, on behalf of myself and the Grace team, I thank you and your team again for meeting with us last month. We found the meeting as well as our exchanges over the past few months have been quite productive. If you have any questions regarding Grace’s good faith offer or would simply like to discuss resolution of this matter further, please do not hesitate to let me know.

We look forward to receiving EPA’s response and continuing to work together to bring this matter to a close.

With best regards, I am

Sincerely yours,



Noelle E. Wooten

cc: Paul G. Bucens, Project Manager, W. R. Grace & Co.
Lydia B. Duff, Esq., Associate General Counsel – EHS, W.R. Grace & Co.
Valerie Mann, United States Department of Justice
Pamela D. Marks, Esq., Beveridge & Diamond PC

EXHIBIT A

NACO FIRM SEEKS TO BUY AA PLANT

11-18-1948 5

**Negotiations For Sale
Now Being Made ;
\$100,000 Involved**

The Naco Fertilizer company, whose plant was partially destroyed in the spectacular waterfront fire the night of Labor Day, is negotiating for purchase of the factory and property of the American Agriculture Chemical company, at Almont, located on the western bank of the Northeast branch of Cape Fear river.

J. M. Blass, manager of Naco, said yesterday afternoon that he expected negotiations to be consummated in the near future, and that the transaction would involve approximately \$100,000, including a quantity of fertilizer materials.

The AA plant will be much larger than the old Naco plant, which was located in Atlantic Coast Line Warehouse "C," at the foot of Hanover street, and which will be abandoned by Naco. Additional machinery will be installed in the new plant, Blass said, adding that the total capacity of the new set-up would approximate 30,000 tons of fertilizer annually.

Blass estimated that the Naco loss suffered in the fire would approximate \$100,000, but he added that insurance adjusters and engineers are still working on details of the damages suffered in the blaze.

He said the Naco concern was anxious to continue operations in a plant with dock facilities on Cape Fear river, although he added that for the time being, or at least until the European situation clears up, Naco would not import cargoes by vessels.